Supreme Court, U.S.
FILED
MAR 4 1998
OFFICE OF THE CLERK

(8)

No. 97-569

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.

Petitioner,

v.

KIMBERLY B. ELLERTH,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN L. MAHALLATI
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CAROL CONNOR FLOWE
Counsel of Record
MARC A. TENENBAUM
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Amicus Curiae

38 pp

QUESTION PRESENTED

Whether an employer is strictly liable, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, for a supervisor's request for sexual favors that is accompanied by a threat of adverse job consequences, where the threat is never fulfilled.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

A. The Distinction Between Quid Pro Quo and Hostile Environment Sexual Harassment Evolved to Describe the Kind of Conduct that is Actionable Under Title VII, Not the Circumstances Under Which an Employer Should Be Liable for an Actionable Claim 9

B. Employers Should Not Be Strictly Liable For a Supervisor's Unfulfilled Threats 14

C. A Supervisor's Unfulfilled Threats Should, in Some Circumstances, Be Actionable 20

CONCLUSION 24

TABLE OF AUTHORITIES

Cases — *Page(s)*

Andrade v. Mayfair Management, Inc., 88 F.3d 258 (4th Cir. 1996) 14

Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) ... 9, 10, 11

Bouton v. BMW of N. Am., Inc., 29 F.3d 103 (3d Cir. 1994) 14

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) 10

Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990) 15-16, 23

Craig v. Y&Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983) 12

Crimm v. Missouri Pacific R.R. Co., 750 F.2d 703 (8th Cir. 1984) 12

Daniels v. Essex Group, Inc., 937 F.2d 1264 (7th Cir. 1991) 23

Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997) 14

Downes v. FAA, 775 F.2d 288 (Fed. Cir. 1985) 22

Ellert v. University of Texas, 52 F.3d 543 (5th Cir. 1995) 15

Faragher v. City of Boca Raton, No. 97-282 ..... 1, 8

Page(s)

Faragher v. City of Boca Raton, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438 (1997) 13

Farpella-Crosby v. Horizon Health Care, 97 F.3d 803 (5th Cir. 1996) 14

Garber v. Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977) (per curiam) 9, 10

Gary v. Long, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995) 14, 15, 21

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 13, 21, 22

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 1

Henson v. Dundee, 682 F.2d 897 (11th Cir. 1982) 11, 12, 22

Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644 (6th Cir. 1986) 12, 15, 19

Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985) 12

Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987) 12

Karibian v. Columbia Univ., 14 F.3d 773 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994) 14

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) 12

Page(s)

Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992) 14, 15

Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992) 21

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 1

Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1983) 14

McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995) 1

McKenzie v. Illinois Dep't of Transp., 92 F.3d 473 (7th Cir. 1996) 21

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) ..... *passim*

Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979) .. 10, 12

Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986) 21

Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994) 14

O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996) 1

Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) 21

Page(s)

Reinhold v. Virginia, 1998 U.S. App. LEXIS 1669 (4th Cir. 1998) 20

Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993) 14, 15

Sims v. Brown & Root Indus. Servs., Inc., 78 F.3d 581 (5th Cir. 1996) (unpublished table decision), *aff'g* 889 F. Supp. 920 (W.D. La. 1995), *cert. denied*, 117 S. Ct. 68 (1996) 8, 14

Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) 9, 10

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 1

Walters v. Metropolitan Educ. Enters., Inc., 117 S. Ct. 660 (1997) 1

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 1

Statutes

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ..... *passim*

Page(s)

Other

H.R. Rep. No. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 16

Nancy Brown, Note, *Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 Hous. L. Rev. 441 (1988) 18

Stacy Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 Tex. L. Rev. 435 (1997) 17

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in several hundred cases before the Court, including numerous employment discrimination cases.[2]

This case concerns the parameters of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.* More specifically, the case concerns an employer's liability for a supervisor's request for sexual favors accompanied by a threat of adverse job consequences, where the threat is never implemented. Because Title VII covers

---

[1] The parties have consented to the filing of this brief. Counsel for the Chamber authored this brief in its entirety. No person or entity, other than the Chamber, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Faragher v. City of Boca Raton*, No. 97-282; *Walters v. Metropolitan Educ. Enters., Inc.*, 117 S. Ct. 660 (1997); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995); *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

virtually all employers with fifteen or more employees, 42 U.S.C. § 2000e(b), most of the Chamber's members are subject to Title VII and are, therefore, potential defendants in sexual harassment cases. Accordingly, they have a vital interest in the Court's resolution of the issues in this case.

STATEMENT

Kimberly Ellerth ("Ellerth") was hired by Burlington Industries, Inc. ("Burlington") in March of 1993 as a merchandising assistant. She resigned in May of 1994. During her employment, Ellerth was allegedly sexually harassed by her second level supervisor, Theodore Slowik ("Slowik"). However, she never complained to her immediate supervisor or anyone in authority about this sexual harassment, even though the company had a published policy prohibiting sexual harassment, until three weeks after she resigned.

Ellerth subsequently brought suit against Burlington, contending that, as a result of Slowik's alleged misconduct, Burlington had violated Title VII. The district court ruled for Burlington, holding that, even though Slowik's alleged harassment was sufficiently severe and pervasive to alter the conditions of Ellerth's employment (and therefore constituted hostile environment sexual harassment), agency principles provided no basis upon which to impose liability on Burlington. The court also ruled for Burlington on the "*quid pro quo* insinuations" of Ellerth's claim. Pet. App. 280a. Believing that her *quid pro quo* allegations were merely a "component" of her hostile environment claim, the court held:

> [U]nder the facts of this case . . . although the *quid pro quo* element of Ellerth's hostile environment is not insubstantial, . . . the negligence standard generally applicable to hostile environment harassment is more applicable to this case. To apply a *quid pro quo* standard under these facts would amount to the tail wagging the dog. Moreover, to apply a *quid pro quo* standard here . . . strikes the court as manifestly unjust under the facts presented. It is undisputed that Burlington had a sexual harassment policy in place. Ellerth was fully aware of the policy and consciously chose to disregard it. Under these facts, there is simply no just reason to impose strict liability on Burlington for the hostile environment created by Slowik.

Pet. App. 284a-285a.[3/]

[3/] Pet. App. 280a. The district court did not believe that Ellerth had advanced a separate claim of *quid pro quo* sexual harassment. The court stated:

> We do not mean to suggest that Ellerth has advanced a claim of *quid pro quo* sexual harassment. She has not. Both her complaint and her memorandum of law opposing Burlington's motion for summary judgment expressly indicate that the nature of Ellerth's sexual harassment claim is that she was subject to a hostile work environment.

Pet App. 264a n.10; *see also* Pet. App. 284a ("Of course, Ellerth does not purport to base her claim on a *quid pro quo* theory"). Judge Coffey agreed, arguing that Ellerth waived her *quid pro quo* claim by failing to raise it in her EEOC complaint or her district court pleadings. Pet App. 137a. The remaining

The *quid pro quo* allegations to which the district court referred did not involve tangible economic harm, but rather *threats* of economic harm — threats that were implicit, rather than direct, and that were never carried out. According to Ellerth:

> • In the lounge of a hotel during a business trip, Slowik said, "you know, Kim, I could make your life very hard or very easy at Burlington." Pet App. 27a.
>
> • In a telephone conversation, when Ellerth requested permission to do a special assignment, Slowik said, "I don't have time for you right now, Kim, unless you tell me what you're wearing." *Id.*
>
> • In yet another telephone conversation, he denied her request, and then asked her if she were wearing shorter skirts, because that would make her job "a whole heck of a lot easier." *Id.*
>
> • During a promotion interview, Slowik allegedly rubbed Ellerth's knee and said he had hesitations about promoting her because she was "not loose enough for him." *Id.*

Notwithstanding these allegations, Ellerth was in fact promoted. *Id.* at n.13. And there was no evidence whatsoever that she suffered any other economic or other tangible harm due to rebuffing Slowik's alleged sexual advances.

---

members of the court of appeals, however, apparently disagreed. *Id.*

A majority of the court of appeals nevertheless held that Slowik's unfulfilled threats, if proven, would constitute *quid pro quo* sexual harassment for which Burlington would be strictly liable. Pet App. 6a. Explaining this view, Judge Flaum stated:

> [A] clear and serious *quid pro quo* threat alters the "terms and conditions" of employment in such a way as to violate Title VII and therefore can constitute an actionable claim even if the threat remains unfulfilled.

Pet. App. 17a.

Five judges disagreed. Chief Judge Posner and Judge Manion urged that an unfulfilled threat be characterized as hostile environment sexual harassment. Pet. App. 50a-55a, 158a-161a. Under their view, a court would distinguish between cases involving a "company act," i.e., an act that significantly alters the terms or conditions of employment of the victim of sexual harassment, and a "noncompany act," which signifies hostile environment sexual harassment that involves only unfulfilled threats, so that no company act is committed. Pet. App. 54a. Only the former would constitute *quid pro quo* harassment giving rise to strict employer liability. *Id.* at 54a-55a, 160a-161a.

Judge Coffey would also characterize an unfulfilled threat as hostile environment sexual harassment. Pet. App. 94a-106a. Under his view, a plaintiff could proceed on a *quid pro quo* theory only if she could establish that she had "actually suffered a tangible, job-related loss (such as being fired or denied a promotion) for refusing to go along with the harasser's sexual demands." Pet. App. 105a (emphasis omitted).

Judge Easterbrook similarly stated that an unfulfilled threat should be analyzed as a hostile environment claim. In his view, Ellerth received her injury "exclusively from [her] supervisor's boorish conduct, rather than via the pay envelope or by submitting to unlawful demands." Pet. App. 151a-152a.

Judge Kanne advocated an approach that combines elements from the views of the other judges. Pet. App. 33a. Agreeing with Chief Judge Posner, he would not impose strict liability on an employer for an unfulfilled threat, because doing so would

> yield little (if any) greater deterrence and generate significantly greater litigation costs than a negligence standard. Moreover, *quid pro quo* threats may be ambiguous, and if such threats make an employer strictly liable, plaintiffs will attempt to turn all instances of supervisor sexual harassment into "implied threats" in order to take advantage of strict liability's easier burden of proof.

Id. Judge Kanne agreed with Judge Flaum, however, that an unfulfilled threat should be actionable as a *quid pro quo* claim. In most cases, characterizing a threat as a *quid pro quo* claim will "not make much practical difference because the supervisor's threat will already be relevant to the hostile environment negligence analysis." *Id.* at 34a. But in a case where the threat stands alone, a negligent employer should be liable, "because of the qualitatively more oppressive nature of *quid pro quo* harassment." *Id.* at 33a-34a.

SUMMARY OF ARGUMENT

As presented by the court below, the question in this case is the definition of "an actionable *quid pro quo*," which, according to the court, "is central to the [employer] liability standard." Pet. App. 17a. That formulation, however, assumes that sexual harassment must necessarily be characterized as either "hostile environment" or "*quid pro quo*," and that the standard for employer liability for the two types of harassment is necessarily different.

By their insistence on an inflexible categorization of sexual harassment with differing standards of employer liability, the lower courts have created an unnecessary quandary. If a supervisor's unfulfilled threat of adverse job consequences is characterized as *quid pro quo* sexual harassment, the employer becomes strictly liable under the majority view, even though the supervisor has not exercised his delegated authority, and thus has taken no action susceptible to review and monitoring by the employer. If this unfulfilled threat is characterized as hostile environment sexual harassment, it may not be actionable unless it is part of a pervasive pattern of sexual misconduct by the supervisor, and thus may leave its victim without recourse. Neither result is fully consistent with the objectives of Title VII or this Court's teachings.

Stating the dilemma, however, also suggests its resolution. To the extent there continue to be two separate employer liability standards for sexual harassment, depending on whether the harassment is characterized as hostile

environment or *quid pro quo*,[4] the Court should hold that an unfulfilled threat of adverse job consequences is a hybrid form of harassment, with aspects of both categories. An unfulfilled threat should be actionable, even if it constitutes an isolated incident, where the facts demonstrate that the threat was sufficiently severe or egregious to alter the terms and conditions of the plaintiff's employment. But as with other sexual misconduct that does not involve tangible job consequences, an employer should be liable for an unfulfilled threat only if negligent, i.e., only if it knew or should have known of the threat, and failed to take prompt remedial action.

---

[4] The Court has yet to resolve this question. The Court is currently reviewing, in *Faragher v. City of Boca Raton*, No. 97-282, the view of a majority of the lower courts that an employer is liable for hostile environment sexual harassment only if negligent. And although the Court declined to review the holding of the court below that an employer is strictly liable for *quid pro quo* sexual harassment, Judge Coffey noted in his decision that this strict liability standard is contrary to the Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and at odds with the agency principles that the Court has instructed the lower courts to consider in Title VII cases. Pet. App. 60a (Coffey, J., concurring and dissenting). *See also Sims v. Brown & Root Indus. Servs., Inc.*, 78 F.3d 581 (5th Cir. 1996) (unpublished table decision), *aff'g* 889 F. Supp. 920 (W.D. La. 1995), *cert. denied*, 117 S. Ct. 68 (1996) (rejecting strict liability for *quid pro quo* harassment). For purposes of this brief, however, the Chamber will assume that there are two separate standards.

ARGUMENT

A. The Distinction Between Quid Pro Quo and Hostile Environment Sexual Harassment Evolved to Describe the Kind of Conduct that is Actionable Under Title VII, Not the Circumstances Under Which an Employer Should Be Liable for an Actionable Claim.

In *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia Circuit became the first appellate court to hold that sexual harassment violates Title VII, where a woman's job was abolished in retaliation for her refusal to engage in sexual relations with her male supervisor. Other courts of appeals soon followed suit. *See, e.g., Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Garber v. Saxon Business Prods.*, 552 F.2d 1032 (4th Cir. 1977) (per curiam).

Barnes also addressed the circumstances under which an employer would be liable for sexual harassment by a supervisory employee. Judge Robinson, joined by Chief Judge Bazelon, stated that:

> Generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel. We realize that should a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved of liability under Title VII. But, so far as we are aware, the [employer in this case] is not in position to claim exoneration on that theory.

561 F.2d at 993 (footnote omitted). The third member of the panel, Judge MacKinnon, examined the issue in greater detail, and concluded that the general rule — that an employer is vicariously liable for the discriminatory acts of its supervisors — should not attach in a sexual harassment case. *Id.* at 1001. He nevertheless concurred in the panel's decision, because the facts suggested that Barnes' employer knew or should have known of the harassment involved and had "ratified" the discrimination her supervisor allegedly had imposed upon her. *Id.*

Neither *Garber* nor *Tomkins* expressly addressed the issue of employer liability, because the plaintiffs in those cases alleged either that the employer had acquiesced in a practice of compelling female employees to submit to sexual advances of their male supervisors, *Garber*, 552 F.2d 1032, or that the employer knew or should have known about the alleged harassment. *Tomkins*, 568 F.2d at 1047. In *Miller v. Bank of Am.*, 600 F.2d 211 (9th Cir. 1979), however, the Court of Appeals for the Ninth Circuit held that employers are strictly liable for sexual harassment involving the actions of a supervisor. *Id.* at 213.

In 1981, the Court of Appeals for the District of Columbia Circuit again led the way, recognizing a claim under Title VII for what has now come to be known as hostile environment sexual harassment. In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the court held that a plaintiff stated a claim for sexual harassment "where the employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employee[] lost any tangible job benefits as a result of the discrimination." *Id.* at 943-44. And while the court again noted that "an employer is liable for discriminatory acts committed by supervisory personnel," *id.* at 943 (citing *Barnes v. Costle*, 561 F.2d at

993), it added that the case also satisfied the "more stringent test" of employer liability advocated by Judge MacKinnon in *Barnes*, because the employer was "in full knowledge of the alleged offense" "yet impeded the complaint and even abetted the offenses." *Id.* at n.8.

In these early cases, the distinction between *quid pro quo* and hostile environment sexual harassment related solely to the elements necessary to state a claim. The circumstances under which an employer was liable for the harassment, particularly where it was committed by a supervisor, was analyzed separately. In *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982), however, the Court of Appeals for the Eleventh Circuit combined the two analyses. Following the lead of the District of Columbia Circuit, the court held that "a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII." *Id.* at 902. And the court held that, where the plaintiff seeks to hold the employer responsible for the hostile environment created by her supervisor, "she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Id.* at 905. But the court contrasted this "condition of work" harassment with "*quid pro quo*" harassment, *id.* at 909 & n.18, stating that an employer "is strictly liable for sexual discrimination by supervisors that causes tangible job detriment." *Id.* at 909. The court thus became the first appellate court to articulate clearly a distinction regarding the standard for imposing liability on an employer, based on whether the alleged harassment was *quid pro quo* or hostile environment. It did so, moreover, notwithstanding its observation that, "[o]n a practical level . . . there are many cases that could be characterized interchangeably as condition of work or *quid pro quo* cases." *Id.* at 909 n.18.

Other courts subsequently adopted the distinction set forth in *Henson*, at least insofar as the distinction defined the kind of conduct that was actionable under Title VII. Many of the courts also adopted the employer liability standard that *Henson* attached to the two types of claims. *See, e.g., Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648-49 (6th Cir. 1986); *Jones v. Flagship Int'l*, 793 F.2d 714, 719-22 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *Crimm v. Missouri Pacific R.R. Co.*, 750 F.2d 703, 710 (8th Cir. 1984); *Katz v. Dole*, 709 F.2d 251, 254-56 (4th Cir. 1983). Several of the courts, however, appeared to hold that an employer could be strictly liable for a supervisor's sexual harassment, without regard to which type of claim was involved. *See, e.g., Horn v. Duke Homes*, 755 F.2d 599, 604-05 (7th Cir. 1985) (adopting EEOC rule that an employer is responsible for the acts of its supervisors with respect to sexual harassment regardless of whether the employer knew or should have known of their occurrence); *Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77, 81 (3d Cir. 1983) ("employer liability follows when the supervising employee has broad authority over employment decisions"); *Miller v. Bank of Am.*, 600 F.2d at 213.

This Court considered these issues for the first time in *Meritor*. Noting that the proscriptions of Title VII are not limited to "economic" or "tangible" discrimination, 477 U.S. at 64, the Court confirmed that sexual harassment that is "sufficiently severe or pervasive `to alter the conditions of [the victim's] employment and create an abusive working environment'" is actionable. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F. 2d at 904). Like the Eleventh Circuit in *Henson*, the Court contrasted this "so-called `hostile environment'" sexual harassment with sexual misconduct directly linked to the grant or denial of an economic *quid pro quo*, 477 U.S. 65, and rejected the district court's apparent

belief that a claim for sexual harassment will not lie absent an economic effect on the complainant's employment. *Id.* at 67-68.[3/]

The Court further held, however, that the court of appeals had erred "in concluding that employers are always automatically liable for sexual harassment by their supervisors," "regardless of the circumstances of a particular case." *Id.* at 72, 73. Recognizing that an employer *may* be liable under Title VII for supervisory sexual harassment, the Court "declined . . . to issue a definitive rule on employer liability," leaving it to the lower courts to develop a standard. *Id.* at 72.

Because *Meritor* was a hostile environment case, many of the lower courts interpreted the Court's employer liability holding to apply only to hostile environment claims. Thus, most of the courts have held that an employer is liable for hostile environment sexual harassment by a supervisor only if the employer was negligent. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 118 S. Ct. 438

[3/] The Court further elaborated on the definition of "hostile environment" sexual harassment in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). The standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.*, 510 at 21. Circumstances to be considered in determining whether an environment is hostile or abusive, and therefore actionable, "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

(1997); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 807 (5th Cir. 1996); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996); *Nichols v. Frank*, 42 F.3d 503, 508 (9th Cir. 1994); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1983). A majority of the courts of appeals, however, like the court below, have held, notwithstanding *Meritor*, that an employer *is* strictly liable for *quid pro quo* sexual harassment. *See, e.g., Nichols*, 42 F.3d at 513-14 (collecting cases); *Bouton v. BMW of N. Am., Inc.*, 29 F.3d 103, 106-07 (3d Cir. 1994); *Karibian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir.), *cert. denied*, 506 U.S. 1041 (1992). *But see Sims*, 78 F.3d 581, *aff'g* 889 F. Supp. 920.

Thus, a distinction that evolved merely to broaden Title VII's reach regarding the conduct that will be actionable has now become a distinction that governs the circumstances under which an employer will be liable for that misconduct. As the unfulfilled threats alleged in this case illustrate, however, some sexual harassment claims do not fall readily into either category, and must, therefore, be analyzed on their own.

B. Employers Should Not Be Strictly Liable For a Supervisor's Unfulfilled Threats.

As a result of the manner in which the law in this area has developed, categorizing a sexual harassment claim as either *quid pro quo* or hostile environment will, in most courts, govern whether a non-negligent employer, such as Burlington, is liable for the misconduct. Such was the case in *Gary v. Long*, 59 F.3d 1391 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569

(1995). In *Gary*, there was "no doubt that [the supervisor's] alleged conduct was sufficiently severe and pervasive to create a hostile work environment." *Id.* at 1397. But after applying agency principles, the court held that the employer was not liable for the misconduct. *Id.* at 1397-99.

The plaintiff in *Gary* also claimed, however, that her supervisor's conduct gave rise to a *quid pro quo* claim, making the employer strictly liable for the supervisor's misconduct. As she described it, this conduct consisted of "work-related threats and promises by a supervisor with actual or apparent authority to make good on those threats and promises." *Id.* at 1396. Rejecting her claim, the court of appeals observed that "it takes more than saber rattling alone to impose *quid pro quo* liability on an employer." For *quid pro quo* harassment to exist, "the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances." *Id.* at 396 (citations omitted).

Similarly, in *Highlander*, the court affirmed the dismissal of the plaintiff's *quid pro quo* claim where "the record [was] totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [the supervisor]". 805 F.2d at 649. *See also, e.g., Ellert v. University of Texas*, 52 F.3d 543, 545 (5th Cir. 1995) (*quid pro quo* claim requires proof that employee's reaction to harassment affected tangible aspects of employment); *Sauers v. Salt Lake County*, 1 F.3d at 1127 (for a *quid pro quo* claim, plaintiff must "show that she suffered an economic injury from her supervisor's actions"); *Kauffman v. Allied Signal*, 970 F.2d at 187 (remanding *quid pro quo* claim for determination whether plaintiff suffered tangible job detriment); *Chamberlin*

v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990) (*quid pro quo* claim requires proof of tangible job detriment).

The holdings in these cases are entirely consistent with the Court's decision in *Meritor*. *Meritor* established that sexual harassment leading to noneconomic injury can violate Title VII, 477 U.S. at 65, but it also established that employers are not strictly liable for this type of sexual harassment by their supervisors. *Id.* at 72. By definition, unfulfilled threats involve no tangible or economic harm; accordingly, under *Meritor*, an employer may not be held strictly liable for such threats.

This result is also consistent with the objectives of Title VII: effective deterrence and compensation for harm. *See* H.R. Rep. No. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. As Chief Judge Posner explained below, the emphasis in sexual harassment cases should be primarily on deterrence because, "unlike many torts . . . sexual harassment does not usually bring about a significant change in the victim's wealth." Pet. App. 44a (Posner, C.J., concurring and dissenting). And effective deterrence can best be achieved by a liability standard that creates a financial incentive for employers to manage and monitor their exposure, without imposing compliance costs in excess of the cost of an occasional adverse judgment.

A reasonable employer, knowing it will be liable for its supervisors' sexual harassment only if it is negligent, will take steps to prevent this result. It will, for example, publish a policy defining and prohibiting sexual harassment. It will make it clear that employees who violate the policy, including supervisors, will be promptly and effectively disciplined. It will encourage employees to report sexual harassment. And it will promptly investigate any complaint of sexual harassment and, where warranted, take appropriate remedial action.

A reasonable employer may, moreover, monitor the "company acts" of its supervisors, to ensure that these acts are motivated only by proper reasons. Thus, for example, it may require that all supervisory decisions be documented. Or it may establish an effective internal grievance procedure. Steps of this nature can and do limit, if not eliminate, the potential for a supervisor to exercise the employer's authority to sexually harass a subordinate.

Employers will be motivated to take such steps, however, only if they perceive there is a benefit to be gained from doing so. Most employers, of course, will consider it in their interest to eliminate sexual harassment and other forms of discrimination from the workplace in any event, if only because this type of misconduct leads to unhappy, and therefore less productive, workers. But because vigilant efforts to stamp out all discriminatory conduct can be costly, the additional financial incentive of avoiding liability will motivate employers to take even greater steps to ensure that they are not found negligent in their efforts to prevent sexual harassment if the liability avoided is greater than the added expense. *See* Stacy Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 Tex. L. Rev. 435, 454 (1997) ("[i]f an employer is subject to a knew-or-should-have-known standard, it will not have the incentive to ignore the harassment; rather, it will be sure to establish preventative and remedial programs to insulate itself from liability"); Pet. App. 33a (Kanne, J., concurring) ("[a] negligence standard will serve to deter *quid pro quo* threats because employers will rationally seek to avoid liability" by establishing policies to prevent improper conduct and by imposing appropriate sanctions against violators).

If, however, an employer is to be strictly liable for sexual harassment notwithstanding its efforts, it may determine

that the costs of prevention are simply too great, particularly in the case of sexual misconduct that does not involve a "company act." As Chief Judge Posner explained:

> Suppose the supervisor threatens to fire a subordinate unless she'll have sex with him, and she agrees—or refuses and he does not carry out on his threat. In either case, because he has not used his delegated authority to commit a company act, there is no way in which a system for vetting such acts would catch him out.

Pet. App. 51a. *See also* Pet. App. 33a (Kanne, J., concurring) ("there is not much an employer realistically can do to put a stop to *quid pro quo* threats that do not result in any adverse job consequences). If non-negligent employers are to be held strictly liable in circumstances such as these, where even extraordinary efforts to monitor their exposure are unlikely to be uniformly effective, many employers may decide that it is less costly simply to bear the financial burden of an occasional judgment. *See* Nancy Brown, Note, *Meritor Savings Bank v. Vinson: Clarifying the Standards of Hostile Working Environment Sexual Harassment*, 25 Hous. L. Rev. 441, 461 (1988) ("strict liability standard causes employers to wonder why they should take any preventative measures at all").[6]

---

[6] Based on a similar analysis, Chief Judge Posner concluded that strict liability *is* justified for sexual harassment that involves a company act, but not for harassment that does not involve such an act. The logic of this analysis, however, applies equally to both forms of sexual harassment, because strict liability will, in either case, frequently make it less attractive for an employer to take extraordinary (and often

Moreover, as Judge Kanne observed, there is yet another adverse consequence that will flow from imposing strict liability on employers for their supervisors' unfulfilled threats: the likelihood that plaintiffs will allege an implied threat in every supervisory sexual harassment case, to take advantage of strict liability's easier burden of proof. Pet. App. 33a (Kanne, J., concurring). This case, in fact, vividly illustrates that phenomenon. Apparently recognizing that Burlington had not been negligent and would not, therefore, be held liable for hostile environment sexual harassment, Ellerth dropped her hostile environment claim and instead pursued a claim for *quid pro quo* harassment based on implied threats allegedly made by her supervisor.

The Sixth Circuit's decision in *Highlander* provides another example demonstrating the legitimacy of Judge Kanne's concern. The plaintiff in *Highlander* failed to state a claim for hostile environment sexual harassment because she "failed to demonstrate that she was offended in any significant way by the asserted incidents" or that "the asserted incidents, if in fact they occurred, had the effect of reasonably interfering with [her] work performance." 805 F.2d at 644, 650. The plaintiff then asserted a *quid pro quo* claim, contending that her supervisor had "placed his arm around her and stated that if she was interested in becoming a co-manager, `there is a motel across the street.'" *Id.* at 645. Rejecting her claim, the court noted that this alleged threat was, by the plaintiff's own testimony, induced by her suggestion that she and the supervisor meet in a bar to discuss her promotion opportunities, and that both she and her husband had discounted the seriousness of the incident immediately after it occurred. In

---

costly) steps to monitor and prevent sexual harassment in the workplace.

addition, "the record was totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by [her supervisor]." *Id.* at 649. To the contrary, the evidence adduced at trial disclosed that the supervisor had no role whatsoever in the company's subsequent decision to terminate the plaintiff's employment due to her repeated absences from work. *Id.* Thus, the Court did not permit the plaintiff to convert her failed hostile environment claim into a *quid pro quo* claim in order to hold the employer strictly liable.

In other courts, however, plaintiffs have prevailed in this effort, despite their employers' diligent efforts to prevent sexual harassment. In *Reinhold v. Virginia*, 1998 U.S. App. LEXIS 1669 (4th Cir. 1998), for example, the court held that the employer was not liable for hostile environment sexual harassment, because it took prompt and effective remedial action as soon as it learned of the supervisor's inappropriate behavior. *Id.* at *32, *48-*49. But the plaintiff also asserted a *quid pro quo* claim, alleging that her supervisor (whose sexual advances she had rejected) had denied her permission to attend a non-mandatory professional conference, and had assigned her additional work assignments. *Id.* at *37-*38. She offered no evidence of a link between either of these matters and a promotion or other tangible employment benefit, and did not demonstrate that her position, authority and responsibilities were in any way threatened. *Id.* at *52 (Niemeyer, J., concurring and dissenting). A majority of the panel nevertheless concluded that the employer would be strictly liable for the misconduct if the plaintiff proved her allegations. *Id.* at *40. The plaintiff was permitted, in other words, to "take advantage of strict liability's easier burden of proof" Pet. App. 33a, by turning her supervisor's sexual harassment into an implied threat.

C. A Supervisor's Unfulfilled Threats Should, in Some Circumstances, Be Actionable.

As discussed above, employers should not be held strictly liable for a supervisor's unfulfilled threats. However, characterizing the threat as a hostile environment claim to avoid strict liability may lead to another untenable result: an isolated incident, even one involving egregious circumstances, may not be found actionable. Analyzing unfulfilled threats independently of whether they qualify as *quid pro quo* or hostile environment claims will also avoid this consequence.

In the District of Columbia Circuit's decision in *Gary*, the unfulfilled threats about which the plaintiff complained were one component of a pattern of extremely egregious sexual harassment, "culminating in a rape." 59 F.3d at 1397. Indeed, there was "no doubt" that the alleged misconduct created a hostile work environment. *Id.* But had the threats in *Gary* stood alone, the court of appeals likely would have held that they were not actionable under Title VII, even if the employer had been negligent. Based on their understanding of this Court's decisions in *Meritor* and *Harris*, the lower courts routinely hold that a plaintiff fails to state a claim for hostile environment sexual harassment unless the sexual misconduct is "pervasive," i.e., involves repeated incidents of misconduct. *See, e.g., McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (harassment not actionable because it involved only "three sexually suggestive comments over a three-month period"); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) ("[harassing] incidents must be repeated and continuous"); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 n.7 (6th Cir. 1986) (harassment must be "systematically directed to the plaintiff over a protracted period of time), *cert. denied*, 481 U.S. 1041 (1987); *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir.

1986) (isolated incidents not sufficient to establish a violation); *Downes v. FAA*, 775 F.2d 288 (Fed. Cir. 1985) ("a pattern of offensive conduct must be proved). Thus, if analyzed under a traditional "hostile environment" framework, an unfulfilled threat may not be actionable at all under Title VII.

The Court's prior decisions, however, do not require that result. To be sure, the Court stated in *Meritor* that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive `to alter the conditions of [the victim's] employment and create an abusive environment'." 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d at 904). But the Court further suggested that some conduct may be sufficiently serious in and of itself to state a claim. *Id.* (noting that the respondent's allegations, which include "criminal conduct of the most serious nature — are plainly sufficient"). Similarly, in *Harris*, the Court observed that the factors that may be considered in determining whether an environment is hostile and abusive include not only the "frequency of the discriminatory conduct," but also its "severity" and "whether it is physically threatening or humiliating." 510 U.S. at 23.

In applying these principles, it makes little difference whether allegations of unfilled threats are labeled as "hostile environment" or "*quid pro quo*" claims, because these are judicially created terms that do not appear in the text of the statute. What *is* important is that the Court evaluate such claims under a standard that is consistent with the Court's precedents and with the language and purposes of Title VII.

In accordance with these objectives, a supervisor's unfulfilled threat of adverse job consequences should be actionable if it is part of a pattern of sexual misconduct sufficiently severe to alter the terms and conditions of the plaintiff's employment. Such a threat should also be actionable

where the facts and circumstances establish that it is sufficiently egregious that, even standing alone, it alters the terms and conditions of the plaintiff's employment. In either case, however, the employer should be held liable only if negligent, i.e., only if it knew or should have known of the supervisor's misconduct and failed to take prompt and effective remedial action.

To illustrate, suppose that a supervisor never carries out a threat of adverse job consequences because the employee submits to his sexual blackmail. Under that scenario, even a single incident may be so egregious that it alters the conditions of the victim's employment. *See Chamberlin*, 915 F.2d at 783 ("a supervisor's demand that an employee submit to an unwelcome sexual advance or face discharge from employment could well constitute a sustainable *quid pro quo* harassment claim"). *Cf. Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 & n.4 (7th Cir. 1991) (a single egregious incident, such as performing Ku Klux Klan ritual in workplace, would create racially hostile environment).

By contrast, suppose that an employee rebuffs a supervisor's sexual advance, yet the supervisor never carries out a threat of adverse job consequences. In practice, as Judge Kanne observed, such a threat will rarely stand alone. (Pet. App. 34a.) And such a threat, in combination with other incidents, could obviously contribute to a pattern of misconduct "sufficiently severe . . . 'to . . . create an abusive working environment.'" *Meritor*, 477 U.S. at 67. But an isolated threat of this nature would not ordinarily be sufficient to alter the terms and conditions of an individual's employment, and would not, therefore, be actionable under Title VII.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN L. MAHALLATI
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CAROL CONNOR FLOWE*
MARC A. TENENBAUM
ARENT FOX KINTNER
PLOTKIN & KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 857-6000

Counsel for Amicus Curiae
*Counsel of Record

Dated: March 4, 1998